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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 700

PEOPLE OF THE STATE OF ILLINOIS, EX REL., ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND, ASSIGNEE OF GEORGE C. BERRA; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Petitioners,

vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION, AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois, entered June 12, 1941 (application

for extension of time for petitioning for writ of certiorari having been granted by a Justice of this Court to and including October 13, 1941).

It is noteworthy that in this case three opinions have been written by the Illinois Supreme Court, the final opinion by a divided court, two justices writing dissenting opinions. Also, the final opinion of the court reaches a conclusion directly opposite to that of the Supreme Court of Oklahoma in two recent opinions dealing with the same subject.

Opinion Below.

The opinion of the Supreme Court of Illinois entered June 12, 1941, upon denial of petitioners' petition for a rehearing, modifies a previous opinion entered April 15, 1941, reverses a former opinion of the same Court in favor of petitioners entered December 16, 1940, and affirms an opinion of the Appellate Court of Illinois, Second District, entered February 17, 1940. The chief justice and one associate justice wrote dissenting opinions, the chief justice stating that in his view of the case petitioners had been deprived of their rights without due process of law. Issuance of mandate was stayed by order of the chief justice of the Supreme Court of Illinois in vacation entered June 26, 1941, pending final disposition of this case in the Supreme Court of the United States.

Summary Statement.

The Peoria Life Insurance Company (hereinafter called the "Peoria Life") was an insurance company with its main office at Peoria, Illinois.

On November 15, 1933, upon the petition of Ernest Palmer, Director of Insurance of the State of Illinois, the Circuit Court of Peoria County, Illinois, found that the capital stock of the Peoria Life was impaired. Respondent, Charles V. O'Hern, was appointed receiver.

Subsequently, on June 22, 1941, Respondent Timothy W. Swain was appointed successor receiver.

This action arises out of seven claims filed in apt time against the receiver by petitioners, former agents of the Peoria Life, or, in two cases, their assignees. Since the two assignees stand in all respects in the shoes of their assignors they will not hereinafter be differentiated. The agents had contracts with the Peoria Life, by the terms of which they were to be paid, as part or all of their compensation, renewal commissions for a period of years on insurance business written by them. Some of the petitioners were general agents whose sole compensation consisted of commissions on renewals. Prior to the date of receivership all but two of the agents had already retired, and their contracts were terminated as to future activity, with the agreement, nevertheless, that they would continue to receive renewal commissions for the length of time and in the amount set forth in their contracts, as compensation for services already fully performed. Under all the contracts commissions on renewals were paid solely for the agent's original work in securing the policies, and no part of the renewal commissions was compensation for servicing the business or keeping it in force.

Subsequent to the appointment of the receiver, the Circuit Court of Peoria County entertained proposals for the reinsurance of the business of the Peoria Life. The successful contender was Life and Casualty Company of Chicago (name subsequently changed to Alliance Life Insurance Company; hereinafter called "Alliance Life"). By amendment to petitioners' original claims and by a general voluntary appearance the Alliance Life became a party defendant and is now a respondent to this proceeding.

The decree approving the Reinsurance Agreement between the Receiver and the Alliance Life was entered August 22, 1934, prior to the filing of petitioners' claims, and, as the Circuit Court expressly found, without any

notice whatsoever to petitioners. Section 4(e) of this decree provided that the contracts of former agents of the Peoria Life, including those of petitioners, were "disaffirmed" as of the date of receivership, November 15, 1933. By the judgment of the Supreme Court of Illinois this decree is interpreted to mean that the agents' contracts are disaffirmed, not only as to their right to act as agents in the future, but also as to commission interests theretofore acquired. By Section 37 of the Reinsurance Agreement, which was approved by said decree, the Alliance Life repudiated any obligation to former agents, including petitioners, under their contracts with the Peoria Life.

Sections 31 and 32 of the Reinsurance Agreement established a Peoria Life Fund, to be managed by the Alliance Life and to include all income and disbursements with respect to the Peoria Life business reinsured. It was provided that said fund was to be segregated and remain separate from the assets of the Alliance Life for a period of years beyond the time for which renewals are claimed by petitioners.

There was never any sale of the assets of the Peoria Life and distribution of the proceeds to creditors. The Alliance Life paid nothing and is not obligated to pay anything for the business of the Peoria Life, and, under the terms of the Reinsurance Agreement, it is protected against loss by a fifty per cent lien against the policies of the Peoria Life and by a schedule of fees and charges which it is permitted to make against the Peoria Life Fund for managing the business reinsured. The appreciation in value of the Peoria Life assets since 1933 will also ultimately inure to the benefit of the Alliance Life.

All policy holders of the Peoria Life who did not expressly dissent from the Reinsurance Agreement were assumed to assent to its terms. The assenting policy holders were in the great majority, and each was issued a cer

tificate of assumption by the Alliance Life. Said policy holders have retained their original policies and have continued to pay to the Alliance Life as premiums thereon the amount called for by said policies (less a slight deduction therefrom by reason of elimination of an accident and health clause not material here). Said premiums still include the amount originally figured in as "loading" to pay the renewal commissions sought to be recovered in this litigation. The Alliance Life admits that it is paying the amount of these renewal commissions on the Peoria Life business to someone other than Petitioners and sometimes to agents of its own who had no part in selling the policies and who in some instances have performed no service whatsoever in return therefor.

Throughout this litigation in the courts of Illinois, petitioners' prayer has been for an accounting of renewal commissions on premiums paid by policy holders either to the Receiver or the Alliance Life on insurance policies written by petitioners; and, as against the Receiver, in the alternative for damages in compensation for services performed before receivership.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 237(b) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. C. A. Title 28, § 344). From the beginning of this litigation petitioners have preserved the constitutional question of due process of law, and they here continue to contend that, by the final judgment of the Supreme Court of Illinois, the highest court of that state, they are deprived of property rights without due process of law, contrary to Article XIV of the Amendments to the Constitution of the United States.

The Questions Presented.

The only fundamental question presented is whether petitioners by the judgment of the Supreme Court of Illinois have been deprived of property rights without due process of law contrary to Article XIV of the Amendments to the Constitution of the United States. This question takes the following aspects:

(1) Whether petitioners can be deprived of a property interest and their rights concluded by a reinsurance agreement, to which they were not parties, approved by a decree of the Circuit Court, Peoria County, Illinois, entered at a hearing at which they were not present and of which they had no notice whatsoever and from which they had no right of appeal or other redress, although they were parties in interest.

(2) Whether, independent of the Circuit Court of Peoria County and irrespective of its intent in "disaffirming" petitioners' contracts as of the date of receivership, petitioners have not been deprived of property rights without due process of law by the interpretation subsequently given the decree of the Circuit Court by the Appellate and Supreme Courts of Illinois, to-wit: that said decree destroyed rights already fully acquired and vested.

(3) Whether petitioners have vested property rights in insurance business which they wrote for the Peoria Life under contracts wholly executed by them and executory only as to payment to them of renewal commissions.

(4) Whether, considering that said policies have been "* * * revived and renewed * * *" by a court decree and "* * * reinsured and assummed * * *" by the Alliance Life under its reinsurance agreement and that payment of premiums has continued to be made either to the Receiver or to the Alliance Life, petitioners have a continuing right to receive their renewal commissions as premiums are paid.

(5) Whether petitioners have a property right in the nature of an equitable lien ataching to premium payments in the amount of their renewal commissions of which they have been deprived without due process of law.

(6) Whether petitioners have property rights as beneficiaries of a trust created when respondents received premiums on policies in which petitioners had a renewal commission interest of which they have been deprived without due process of law.

(7) Whether petitioners have been deprived of their property without due process by reason of being denied a cause of action for damages for the anticipatory breach of a contract fully performed by them.

(8) Whether the receivership of the Peoria Life could terminate petitioners' contracts in the sense of destroying rights wholly accrued, when the policies written by petitioners have been continued in force and premiums thereon paid, first to the Receiver and then to the Alliance Life, no further service remaining to be done by petitioners.

(9) Whether petitioners, who have been denied all renewal commissions on premiums paid subsequent to the date of receivership, have been inequitably discriminated against as compared with other creditors of the Peoria Life, they being the only creditors who have been denied recovery on their claims both as against the Receiver and the reinsuring company.

(10) Whether the Alliance Life, which reinsured the business of the Peoria Life, should in equity be permitted to divert to its own uses the renewal commission interest of petitioners, thereby becoming unjustly enriched at petitioners' expense.

(11) Whether an insurance company (the Alliance Life) reinsuring the policies of another company in receivership (the Peoria Life) may in equity be permitted to receive all

the premium income and other benefits of the business reinsured without any expense to it and assume none of the burdens, such as payment of renewal commissions, incident thereto.

(12) Whether it is not a material consideration that petitioners' contracts expressly provided (1) that suspension of business by the Peoria Life should not affect commissions previously acquired, and (2) that five of the petitioners were no longer in the employ of the Peoria Life at the date of the receivership, but were nevertheless being paid their renewal commissions on business previously written; both of which factors were ignored by the opinion of the Illinois Supreme Court.

(13) Whether the receivership of the Peoria Life was a liquidation in such a sense as to reduce petitioners to the position of creditors, or whether said receivership was not ultimately transformed into a rehabilitation proceeding which left petitioners' vested interests unaffected.

Reasons Relied on for Allowance of the Writ.

(1) The Supreme Court of Illinois in its opinion in this case has departed from fundamental principles of law long recognized by this Court and has thereby deprived petitioners of their rights without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, petitioners being without remedy other than to petition this Court for a writ of certiorari.

(2) In particular, the judgment of the Supreme Court of Illinois deprives petitioners of vested property rights without due process of law, to-wit: without any notice or opportunity to be heard, or opportunity of appeal or other redress.

(3) The Supreme Court of Illinois in its majority opinion ignores the vital constitutional issues raised by this

case; whereas the Chief Justice of that Court in his dissenting opinion says, in part:

> "The view of the majority seems to support the proposition that the termination of the appellants' rights to act as agents has terminated all of the rights they have accrued under such contracts. To this I cannot accede, as I believe to so hold would authorize the taking of property without due process of law in the class of cases above specified."

(4) This case involves not only substantial amounts of money as it affects the parties hereto, but also substantial questions of law affecting life insurance companies and their agents everywhere, in a field in which there are comparatively few decisions and the courts are in disagreement.

(5) The Supreme Court of Illinois, after stating in its opinion that this case raises the question of petitioners' rights against the Receiver of the Company reinsured, wholly failed to adjudicate such rights.

(6) The judgment of the Supreme Court of the State of Illinois did not treat petitioners on an equality with other creditors of the Peoria Life, thereby depriving petitioners of their property without due process of law, contrary to Article XIV of the Amendments to the Constitution of the United States.

(7) There was never any liquidation of the Peoria Life in the sense of a sale of assets and pro rata distribution to creditors, but instead the Alliance Life by paragraph 2 of the Reinsurance Agreement undertook to "reinsure and assume" the Peoria Life business as of the date the receiver was appointed, and the Circuit Court in its decree approving that agreement found that the policies of the Peoria Life "are hereby revived and renewed"; and yet the reinsuring company, which paid nothing for the business, is permitted by the judgment of the Supreme Court

of Illinois to retain all the benefits of those policies as good paying insurance business and appropriate petitioners' interest therein to its own purposes without compensation therefor.

(8) The Supreme Court of Illinois fails to distinguish between termination of the petitioning agents' contracts by receivership in the sense that the two who were still active could no longer solicit prospective purchasers, and termination in the sense that the said agents could thereby be deprived of property rights already vested in them.

(9) The Supreme Court of Illinois ignores the fact that all but two of the petitioners' contracts had been terminated prior to receivership so far as solicitation of business was concerned, the renewal commissions continuing to be paid, so that there can be no doubt of the vested property rights of petitioners.

(10) The judgment of the Supreme Court of Illinois is the first time any court of last resort in any state has denied such claims as those in suit both against the receiver of an insolvent insurance company and against the company reinsuring its business.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Illinois, commanding that Court to certify and send to this Court for its review and determination as provided by the statutes of the United States a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 25695, People of the State of Illinois *ex rel.* Palmer *vs.* Peoria Life Insurance Company, a corporation; In the Matter of Claims of Margaret Harwick, *et al.*, Appellants *vs.* Charles V. O'Hern as Receiver of Peoria Life Insurance Company, *et al.*, Appellees", to the end that this cause may be reviewed and determined by this Court

as provided for by the statutes of the United States and the judgment therein of said Supreme Court of the State of Illinois be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to the Court may seem just and proper.

Dated October 10, 1941.

Margaret Harwick, Assignee of Hugh E. Van DeWalker; Fidelity and Deposit Company of Maryland, Assignee of George C. Berra; T. A. Curnow; Thomas E. Rogers; Edwin B. Seidel; C. H. DeLong; and W. H. Logan,
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